

**A RATCHET THAT CAN GET STUCK: ON THE RELATIONSHIP BETWEEN
THE AMERICAN FEDERAL AND STATES' CONSTITUTIONS**

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Abstract: This essay is a short exposition of the relationship between the civil rights provisions of the federal and state constitutions. It surveys the historical and structural relationships among them, and then examines the ratchet-like operation of state constitutional rights – that is, the fact that state constitutions can only provide more civil liberties than the federal constitution does. As it comes out, there are some important qualifications to the ability of state constitutions (or, for that matter, both federal and state legislatures) to provide greater civil liberties than those of the federal constitution: conflicts between and within civil rights provisions may determine not only the floor, but also the ceiling, for certain constitutional liberties. Consequently, an inordinately conservative U.S. Supreme Court might not only produce a cramped federal civil rights regime, but also limit the ability of the states to expand civil liberties to their own constituencies.

In the 1980s, when the British were deliberating the adoption of a Bill of Rights coupled with the powers of judicial review, some opposed such judicial powers on the ground that British judges were so conservative and “establishment-minded” that their interpretation would result in too cramped a regime of civil liberties.¹ But there was something odd about an argument against judicial review that was based on fear of *contracted* liberties: however cramped a view of a Bill of Rights judges may have, the British Parliament could always go beyond the rights elaborated by judges and offer greater protections.² After all, civil

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¹ For a review of this claim *see* Michael Zander, *A Bill of Rights?* (Sweet & Maxwell, 3d. ed. 1985).

² In fact, it is unlikely that judges reviewing legislation for compliance with a Bill of Rights would have a more cramped view of those rights than the legislature, since judges interpreting a Bill of Rights develop a professional bias that inclines them to expand liberties vis-à-vis legislative actions. As James Madison put it, “independent tribunals of justice will consider

rights provisions constitute the floor for civil liberties, not the ceiling; they mark minimal guarantees, but do not preclude more expansive ones. Thus, granting judges the authoritative say about what the Bill of Rights require (rather than leaving such determinations to the legislature) could only expand civil liberties beyond Parliament's vision, but not contract them. Judicial review even by conservative and establishment-minded judges almost always results in more civil rights. I say *almost* because, as we shall see below, there are some interesting exceptions to this general principle.

A similar situation prevails where the institution that can expand on – but not detract from – judicially-determined civil rights is not a legislature but *another judicial system interpreting another civil rights code*. This is the situation, among other places, in the United States, which has a federal judiciary and a federal constitution operating alongside state judiciaries and state constitutions. Thus these distinct judicial systems (the federal and the states) interpret two distinct constitutional civil rights codes – those of the Federal Constitution (whose authoritative interpreters are the federal courts, though state courts are also authorized to apply them), and those of the constitutions of the various states (whose authoritative interpreters are state courts, though federal courts are also authorized to apply them).

As in the case of a British Bill of Rights authoritatively interpreted by a judiciary (where Parliament may only provide more – but not less – civil rights protections), American state constitutions can only provide more – but not less – civil rights protections than those afforded by the Federal Constitution. And so, similarly, the result of such institutional arrangement will almost always be the expansion of civil liberties. Nevertheless, to repeat, this is not always the case: sometimes an interpretation of the Federal Constitution would prevent state constitutions (or, for that matter, legislatures) from providing greater protections. This happens whenever there are conflicts among civil rights – where one constitutional right restricts the reach of another right, or where granting a right to one party precludes its extension to other parties. In such cases, as we shall see, judicial interpretations of civil rights provisions may provide not only the floor for civil rights protections, but also the ceiling.

Section I provides a structural and historical survey of the relationship between federal constitutional law and state constitutional law; Section II discusses the rise of the so-called New Judicial Federalism – the resurgence of state

themselves in a peculiar manner the guardians of those rights [and] will be naturally led to resist every encroachment upon [them].” (1 Annals of Cong. 439, Gales & Seaton eds. 1789).

constitutions as major sources of civil rights protections; and section III examines those relatively exceptional cases where interpretations of the Federal Constitution may limit the ability of state constitutions (and the ability of state and federal legislation) to expand civil rights.

SECTION I

The U.S. Constitution of 1787 came to replace the earlier Articles of Confederation, which had created too loose a union among the 13 original American states. Accordingly, the new Constitution endowed the federal government with important powers not granted it under the earlier document – including the powers to tax, to raise armies, to regulate the national economy, and to establish a federal court system. Like the older Articles of Confederation – indeed like any constitution hoping to be effective – the new constitution contained a Supremacy Clause, a provision asserting the supremacy of the Federal Constitution (and any federal law authorized by it) vis-à-vis states’ statutory or constitutional law.³ In cases of conflict between state law (including state constitutional law) and federal law, federal law prevails. Needless to say, this supremacy principle also applies to the federal Bill of Rights – as the first ten amendments to the U.S. Constitution, ratified mere three years after the ratification of the constitution itself, are collectively known.

The federal Bill of Rights is intimately linked with many civil rights provisions of state constitutions. Its drafters modeled the Bill of Rights on some early state constitutional provisions,⁴ and judicial interpretations of the Bill of Rights has often been influenced by state interpretations of their own provisions.⁵

³ “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Article VI, Clause 2, United States Constitution.

⁴ Compare VA. BILL OF RIGHTS § 8 (1776), reprinted in THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA (F. Thorpe ed., 1909) [hereinafter STATE CONSTITUTIONS] (“That in all capital or criminal prosecutions a man hath a right to...be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage. . .”), with U.S. CONST. amend. VII. (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...to be confronted with the witnesses against him....”).

⁵ See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 651 (1961) (stating that “more than half of those [states] passing upon [the exclusionary rule], by their own...judicial decision, have wholly or partly (2009) J. JURIS 179

Moreover, some later state constitutions were modeled, in turn, on the federal Bill of Rights,⁶ and the interpretation of state constitutions has often been influenced by, and even tracked one-for-one, the federal judiciary's interpretation of equivalent federal constitutional provisions. (This so-called "lockstep doctrine" has been adopted in some states by court decisions⁷ and even by state constitutional amendments.⁸) Furthermore, certain state constitutional amendments were modeled directly on *judicial interpretations* of the Federal Constitution.⁹ The result, unsurprisingly, is a great similarity between the civil rights protections afforded by the states and those afforded by the Federal Constitution.

Nevertheless, such constitutional protections often do diverge – both because of dissimilar constitutional language, and because of different interpretations of similar provisions. Yet, given the supremacy of federal law over state law, when they diverge they do so in one way only: with state constitutions providing *greater* constitutional protections than those provided by the Federal Constitution.

This state of affairs was not always so. Notwithstanding the Supremacy Clause, the federal Bill of Rights did not, at first, govern state laws or state actions. The Bill of Rights originally applied only to the *federal* government: the impetus for its adoption was concern over the great powers of the newly-created federal regime, and the Bill came as an explicit limitation on the federal government's

adopted or adhered to [it]," in announcing that the exclusionary rule is mandated by the Federal Constitution.

⁶ Compare, e.g., IOWA CONST. art. I, § 8 ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated..."), with U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...") Of course, some similarities between the federal and state constitutions are the result of both the federal constitution and a state constitution borrowing directly from the same state.

⁷ See, e.g., State v. Jackson, 672 P.2d 255, 258 (Mont. 1983) (holding that the protections against self-incrimination contained in MONT. CONST. art. II, § 25 are identical to those contained in the federal Fifth Amendment).

⁸ See, e.g., Florida Const. Art. 1 § 12: Searches and Seizures (1982) ("...This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court...").

⁹ Following the U.S. Supreme Court's recognition of an *implicit* right to privacy in the Federal constitution (under the Due Process Clause), several states amended their state constitutions to include *explicit* provisions guaranteeing privacy rights. See, e.g., ALASKA CONST. art. I, § 22 (added 1972) ("The right of the people to privacy is recognized and shall not be infringed. . .").

ability to turn tyrannical vis-à-vis the people and the states.¹⁰ And so when, in *Barron v. Mayor of Baltimore* (1833), litigants appearing before the U.S. Supreme Court claimed that the city of Baltimore (a state entity) violated certain Bill of Rights provisions, the Court responded by saying that the Bill was simply “not...applicable to the States.”¹¹ The states remained free to violate the federal Bill of Rights – within the limits imposed by their own constitutions.

This constitutional structure was dramatically revised in 1868, with the ratification of the 14th Amendment to the U.S. Constitution. That Amendment – one of three adopted on the heels of the American Civil War – applied explicitly to state governments. Indeed it was *state* governments that administered the system of slavery over which the Civil War had been fought, and which afterward continued to impinge on the civil rights of the now-freed slaves. Among other constitutional guarantees (which include the “Equal Protection of the Laws,” a centerpiece of modern civil rights protection that does not appear in the Federal Constitution), the 14th amendment forbids the states to “deprive any person of life, liberty, or property, without due process of law...” In a long process that began decades after the adoption of the 14th Amendment and is still in the making, the U.S. Supreme Court has read the 14th Amendment Due Process Clause as “incorporating” (i.e., containing, and thereby making applicable vis-à-vis the states) almost all the provisions of the Bill of Rights.¹² It did so by holding that the 14th Amendment’s Due Process Clause protects against violations of “fundamental rights” (defined as “principle[s] of justice...rooted in the traditions and conscience of our people...”¹³), and then reading most of the rights appearing in the Bill of Rights as “fundamental.”¹⁴ Thus the civil liberties enshrined in the federal Bill of

¹⁰ Some early drafts of the Bill of Rights sought to limit the power of state governments as well, but were rejected. (See., e.g., James Madison’s proposed First Amendment, which read: “The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable. No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.” By contrast, the adopted version of the First Amendment begins by stating: “*Congress* shall make no law...” [emphasis added].) *Annals of Congress. The Debates and Proceedings in the Congress of the United States. "History of Congress."* 42 vols. Washington, D.C.: Gales & Seaton, 1834–56.

¹¹ 32 U.S. 243 (1833).

¹² The question of whether the Second Amendment to the U.S. Constitution (which secures the right to “keep and bear arms”) is incorporated through the Fourteenth Amendment is now being litigated in the courts.

¹³ *Palko v. Connecticut*, 302 U.S. 319, 324–325 (1937).

¹⁴ See, e.g., *Malloy v. Hogan*, 378 U.S. 1 (1964) (incorporating into the Due Process Clause the Fifth Amendment’s privilege against self incrimination); *Duncan v. Louisiana*, 391 U.S. 145 (2009) J. JURIS 181

Rights, which originally pertained only to the federal government, finally became binding also on the American states (and on all their derivative local and municipal powers).

SECTION II

To fully understand the significance of this enormous expansion of civil liberties in the U.S., it is important to realize the omnipresence of constitutional law in American legal life. Unlike many other constitutional democracies, which may have a constitution but no powers of judicial review (or highly restricted ones),¹⁵ or which may have judicial review but vest this power in special constitutional courts (often with limitations as to who may bring constitutional claims)¹⁶ – in the U.S. all judges, be they federal or state judges, county or village judges, appellate or trial court judges, judges in courts of general jurisdiction or in bankruptcy courts or in small claims courts, *all* judges enjoy the power of judicial review. Moreover, American constitutional doctrine governs wide swaths of American law, spreading its influence over all sorts of legal actions, so that constitutional claims – be they federal or state constitutional claims – can be found in the smallest and most mundane lawsuits, and in rather abundant quantities. American judges habitually strike down laws, regulations, and executive actions that violate constitutional provisions, or render “limiting constructions” that limit the reach of such laws so as to make them constitutional.

It is therefore unsurprising that the extension of the federal Bill of Rights to the American states, from which it had been previously barred, was immediately felt as a dramatic expansion of civil liberties in America. To be sure, some state constitutions did provide robust civil rights protections, but many American states did not, and the application of the Bill of Rights to those states signaled a radical change in the civil liberties of their residents.

But the ensuing expansion of civil liberties in America was not merely the result of the expanding reach of the federal Bill of Rights: it was also the result of the now-dual system of civil rights protections – the federal Bill of Rights and state constitutional provisions – which allowed state constitutions to move only in

(1968) (incorporating into the Due Process Clause the Sixth Amendment’s right to a trial by jury in criminal cases).

¹⁵ See, e.g., the Dutch constitution (GW. ch. 6, art. 120).

¹⁶ In France, for example, claims can only be brought by a quorum of legislators, or by certain government ministers. 1958 CONST. art. 61.

one direction, namely, toward more civil liberties. As in the case of the proposed British Bill of Rights, interpreted by judges but expandable by Parliament, state constitutions could not derogate from federal constitutional rights but could certainly expand on them.¹⁷

Indeed things could not have been otherwise: it would be absurd to read civil rights provisions as providing the floor *and the ceiling* for civil liberties – if only because such an interpretation would be completely at odds with the text and the intent of such constitutional provisions. The First Amendment to the U.S. Constitution, for example, provides that “Congress shall make no law... abridging the freedom of speech”: on what basis can this legal rule be read to *limit* the ability of Congress (or others) to guarantee that freedom? Such a preposterous reading would conflict, in the most direct way, with the *raison d’être* of such provisions. Moreover, reading constitutional provisions as providing both the floor *and the ceiling* for civil liberties would turn courts into super-legislatures, with the power to exercise judicial review over any government action that affects (rather than merely burdens) civil liberties. (All would depend, of course, on where the judiciary chooses to place the ceiling; but under such a system, all policy in areas touching on civil liberties could be wrested away from legislative hands.) A “floor and ceiling” interpretation of civil rights provisions was not and never could be in the cards. The application of the federal Bill of Rights to the states therefore created a dual system of civil rights protections whereby state courts reading their own state constitutions could provide more, but not less, protections than the Federal Constitution does.

The expansion of civil liberties by state courts interpreting their states’ constitutions beyond the minimum required by the Federal Constitution – a phenomenon known in the United States as “New Judicial Federalism” – began in earnest only in the 1970’s, and for obvious reasons. The process of “incorporation” – i.e. that of making the federal Bill of Rights applicable to the states – achieved real momentum only with the famous Warren Court (named after Chief Justice Earl Warren) of the 1960’s, a Court that also gave an expansive interpretation to the provisions of Bill of Rights. The Warren Court expanded civil rights in virtually all directions – from free speech rights, to equal protection, to voting rights, to the rights of criminal defendants both during the investigatory stage and later at trial. Consequently, these newly

¹⁷ See, e.g., Prunyard, at 81 (“Our reasoning in *Lloyd*, however, does not *ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.”).

applicable Bill of Rights protections went beyond many of those afforded by the states (indeed otherwise the occasions for “incorporating” them would not have arisen). It was only when the Burger (1969-1986) and then the Rehnquist (1986-2005) Courts came on the scene that the U.S. Supreme Court began *contracting* civil liberties, refusing to continue down the road of expansive civil rights and chipping away at some of the rights recognized by earlier decisions. It was under these more conservative federal supreme courts (including today’s Roberts Court) that state courts began to go beyond federal protections more aggressively through interpretations of their own constitutional provisions (though, to repeat, state constitutions were always at liberty to provide greater civil rights protections than the federal Bill of Rights, as some in fact did¹⁸). Interestingly, this trend was explicitly encouraged by some liberal U.S. Supreme Court justices, who now found themselves only too often in the dissent, and who kept reminding their colleagues on state courts that U.S. Supreme Court decisions constituted only the minimal protections that states could provide.¹⁹

When state courts first began reading their state constitutions as going beyond federal civil rights protections – often under provisions identical or near-identical to the federal ones – there were indignant outcries from various quarters. Many of these decisions concerned criminal procedure, a highly controversial area of civil liberties in the crime-ridden U.S., and some scholars, politicians, and law enforcement officials soon proclaimed them unjustified judicial activism and a blow to national uniformity.²⁰ Some actions were taken: in some instances state constitution were amended so as to overrule judicial interpretations;²¹ in others, a constitutional provision was added so as to restrict

¹⁸ See, e.g., New York State’s expansive right to counsel under Article I, Section 6, of the New York Constitution.

¹⁹ See, e.g., *Robbins v. California*, 453 U.S. 420, 451 n. 12 (1981) (Stevens, J., dissenting) (“[D]rivers in many states will have to persuade state supreme courts to interpret their state constitution’s equivalent to the Fourth Amendment to prohibit the unreasonable searches permitted by the Court here.”). See also William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); William J. Brennan Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535 (1986).

²⁰ See, e.g., Earl M. Maltz, *False Prophet – Justice Brennan and the Theory of State Constitutional Law*, 15 Hastings Const. L. Q. 429 (1988).

²¹ For example, in 2008 California voters approved a state constitutional amendment prohibiting the state from recognizing marriages between same-sex couples after the California Supreme Court interpreted the California constitution (under provisions similar to the federal ones) as going beyond the protections afforded by the Federal Constitution. See, in *Re Marriage Cases*, 183 P.3d 384 (Cal. 2008). The legality of this 2008 amendment is currently being challenged in the California courts.

the courts from going beyond federal constitutional rights, at least in some areas of constitutional law.²² (Such an amendment, of course, essentially writes off a state's own constitutional provisions – though many of these provisions pre-date the applicability of the Bill of Rights to the states, so that their virtual annihilation is not wholly unfounded.) And sometimes, as already mentioned, the decision to toe the federal line came from state supreme courts themselves, in the form of the “lockstep doctrine,” which can be found in quite a number of states.²³ Still, the phenomenon of Judicial Federalism – that is, of state courts going beyond federal Bill of Rights protections in their interpretation of constitutional provisions that are similar to the federal ones – has endured those past (and present) critiques, and is today an entrenched feature of the American constitutional landscape.

Which brings us back to our initial point – that a polity operating under two concurrent Bills of Rights, interpreted by two court systems, where one of those systems reading one of those Bills of Rights is authoritative as to minimal civil rights protections, can only gain in civil liberties, because the second (subservient) Bill of Rights operates as a ratchet capable of moving in only one direction – towards greater civil rights protections. As a matter of fact, however, there are cases where the authoritative Bill of Rights limits the protections afforded by the second Bill of Rights – and (in the American case) the ability of state courts (or legislatures) to provide greater protections under their own constitutional provisions.

SECTION III

The ratchet-like operation of such dual civil rights systems gets stuck whenever civil rights conflict: that is, when extending liberties in one direction limits their extension in another.

The U.S. Supreme Court has faced a number of such cases. *Pruneyard Shopping Center v. Robins*, a case from 1980, involved the free speech rights of protestors at a private shopping mall.²⁴ In 1976 the U.S. Supreme Court, overruling an earlier precedent, held that – unlike government entities – privately-owned shopping malls were not bound by the free speech provisions of the First

²² See, e.g., fn. 8, *supra*.

²³ See, e.g., *State v. Tisler*, 469 N.E.2d 147, 157 (Ill. 1984) (holding that Ill. Const. Art. 1, § 6 is coextensive with U.S. Const. Amend. 4 for purposes of probable cause for an arrest; overturning state appellate court).

²⁴ 447 U.S. 74 (1980).

Amendment.²⁵ But when political protestors were thrown out of a shopping mall in Campbell, California, the California Supreme Court held that the California Constitution's free speech provision did apply to these privately-owned shopping centers.²⁶ The shopping mall owner then appealed to the U.S. Supreme Court, arguing, *inter alia*, that the California decision violated his *property rights* under the 5th Amendment to the U.S. Constitution. In other words, the owner argued that the free speech rights recognized by the California Constitution were in conflict with private property rights recognized by the Federal Constitution – and should therefore be invalidated under the Supremacy Clause. The U.S. Supreme court ultimately rejected the claim, stating that no federal constitutional right was violated; but here was an instance where the ratchet could have gotten stuck: expansive civil rights under one provision could have constricted civil rights under another, and thus could have prevented state courts from expanding civil liberties under that second provision.

The potential for such conflicts is not insignificant, especially given the ever-expanding scope of constitutional protections. Property rights may conflict not only with free speech rights but also, for example, with equal protection rights (expansive rights of exclusion from private property may conflict with anti-discrimination rights); equal protection rights may in turn conflict with rights of association (one landmark U.S. Supreme Court decision held it a violation of the constitutional right of expressive association to forbid the Boy Scouts of America from discriminating against homosexuals²⁷). The right to free speech could conflict with the constitutional right to a fair trial (the U.S. supreme Court invalidated a regulation forbidding judicial candidates running for office from making controversial political statements during their campaigns, raising concerns about the impartiality of America's state judiciary²⁸); the right to the free exercise of religion could conflict with the prohibition on the establishment

²⁵ *Hudgens v. NLRB*, 424 U.S. 507 (1976).

²⁶ The federal First Amendment reads: "Congress shall pass no law" The relevant California Constitution provision reads: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." In its decision the Supreme Court of California took note of the fact that "[t]hough the framers could have adopted the words of the federal Bill of Rights they chose not to do so." *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 346 (Cal. 1979).

²⁷ *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

²⁸ *Republican Party of Minn. v. White*, 536 U.S. 765 (2002). Most state judges – as opposed to federal judges – are elected for office.

of religion (consider chaplains running prayer sessions in the military);²⁹ and claims were made in the U.S. Supreme Court that the right to life conflicts with the right to have an abortion,³⁰ or with the right to refuse medical treatment³¹ – the list goes on and on. Expansive civil rights in one domain may effectively curtail civil rights in another.

Another source of restriction on the ability of state constitutions to expand civil liberties is interpretations of a civil right that expand that right to some claimants while effectively blocking it to others. The U.S. Supreme court has recently rendered such an interpretation of the Equal Protection Clause. Faced with a lawsuit on behalf of white parents whose children were denied a place in their public school of choice because of their race, the Court held that the affirmative action policies of two schools were unconstitutional³². The decision struck down efforts on the part of public school officials to achieve greater racial integration in the American educational system, where housing patterns often produce racially homogenous schools. The dissenting justices in the case objected that although such affirmative action policies were not *mandated* by the Federal Constitution's Equal Protection Clause, neither were they forbidden by it. More to our point, racial integration of public schools, hypothetically speaking, may be *mandated* by the Equal Protection provisions of *state* constitutions. Here was a conflict between the claims for equality of two groups – white pupils denied admission to the school of their choice because of attempts to racially integrate American public schools, and minority pupils whose racially homogenous schools produce less effective learning environments, and presumably contribute to the isolation of the races. The decision, in accepting the claim of the former, effectively foreclosed the possibility that the latter's claim for equality would be recognized (either by a state constitution or by a legislature).

Naturally, conflicts among rights can also arise under a single, unified constitutional system; but these conflicts assume an added significance in the context of dual systems, where they may place a sharp limitation on the autonomy of a subordinate entity (be it an American state, or a European country subjected to a European-wide civil rights regime). Such conflicts mark an important qualification to the general principle of a ratchet-like operation: dual civil rights adjudicative systems could provide more civil rights protections

²⁹ See, e.g., *Locke v. Davey*, 540 U.S. 712 (2004).

³⁰ See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

³¹ *Cruzan v. Dir. Mo. Dept. of Health*, 497 U.S. 261 (1990).

³² *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

only where the superior system of rights does not contain conflicting constitutional liberties. This is the kernel of truth in the claim with which we began – that conservative and establishment-minded judges interpreting a Bill of Rights may bring about an impoverished regime of civil liberties. Paradoxically, such judges can endanger a robust civil rights regime not by giving cramped interpretations to civil rights provisions, but by giving overly expansive interpretations to some civil rights to the detriment of others.

The concern is a real one. After all, different political ideologies tend to prefer certain civil rights and disfavor others. Thus American conservatives and liberals are likely to differ on the resolution of conflicts between, say, private property rights and free speech rights, rights of association and anti-discrimination rights, or the right to life versus the right to refuse medical treatment – with the result that the resolution of such conflicts may prove damaging to an entire vision of civil liberties.

CONCLUSION

The problem of adjudicating conflicting civil rights provisions is receiving growing scholarly attention.³³ Some of these scholars express doubt at the very possibility of resolving such conflicts rationally, believing they involve inherently unprincipled balancing. Such claims often rely on the alleged ‘incommensurability of fundamental values,’ a thesis denying the existence of a common measure among fundamental values like liberty and equality (that lie at the heart of modern civil rights regimes). That thesis was elaborated, among others, by Isaiah Berlin, who noted: “To assume that all values can be graded on one scale, so that it is a mere matter of inspection to determine the highest, seems to me to falsify our knowledge.” In the end, said Berlin, “the possibility of conflict – and of tragedy – [in the choice among conflicting values] can never wholly be eliminated...”³⁴ If there is no ‘common measure’ with which to compare the fundamental values of equality and liberty, then a conflict between two such constitutional rights cannot be resolved by simply opting for the smaller loss. What makes these conflicts “tragic” is therefore the fact that no given resolution (and its consequent loss) can be justified by comparison to its alternatives (though these alternatives are also no better than the original

³³ See, e.g., LORENZO ZUCCA, CONSTITUTIONAL DILEMMAS: CONFLICTS OF FUNDAMENTAL LEGAL RIGHTS IN EUROPE AND THE USA (2007); CONFLICTS BETWEEN FUNDAMENTAL RIGHTS (Eva Brems, ed., 2008).

³⁴ See, e.g., ISIAH BERLIN, Two Concept of Liberty, in FOUR ESSAYS ON LIBERTY (1969) at 171. (2009) J. JURIS 188

proposal). In the end, such resolutions involve an unjustifiable choice sacrificing value A to value B (though, to repeat, sacrificing value B to value A is equally unjustified).

This has led some scholars to declare that, if the incommensurability of values is to be taken seriously, the resolution of real conflicts among fundamental rights cannot be “rational.”³⁵ Needless to say, such claims have serious ramifications to the institutional arrangement we have been examining here: if true, resolutions of conflicts among fundamental rights would be little more than naked value preferences – the sort of decisions, that is, that are better left to political decision-making rather than to judicial interpretation. Thus the federal judiciary’s imposition of a solution hindering state constitutions from striking a different balance may appear wholly unwarranted: instead, the choice between different civil liberties should be left to legislative determinations, or, as a minimum, to state constitutional provisions (which at least allow for some local autonomy).

Other scholars, unsurprisingly, consider these assessments misguided, and they go to propose grand methodologies for identifying optimal solutions. Some, for example, suggest an order of priority among fundamental rights, while others call attention to a distinction between rights’ ‘cores’ and ‘peripheries’ such that an instance of the former should trump an instance of the latter.

As always, it is advisable to remain skeptical of both extremes in this debate: on the one hand, the possibility of a grand theoretical framework offering a comprehensive rational methodology for the resolution of conflicts among fundamental rights, one that goes beyond trivial generalities, strikes me as overly optimistic: the universe of civil rights is sufficiently diverse, and the occasions for conflicts among them sufficiently varied, that little can be said by way of resolving all such disputes. On the other hand, whatever one can say about fundamental values in the abstract, in the context of specific, contextual conflicts, there *is* usually a less costly resolution to be identified. Moreover, the claim that such resolutions are somehow not *rational* derives from an overly narrow view of rationality – one which denies that tribute to any discourse incapable of producing one uniquely correct result. Courts deciding conflicts among civil rights – by comparing expected benefits and costs – are engaged in

³⁵ Lorenzo Zucca, *Conflicts of Fundamental Rights as Constitutional Dilemmas*, in CONFLICTS BETWEEN FUNDAMENTAL RIGHTS 19, 20 (Eva Brems, ed., 2008) (“conflicts of fundamental rights may entail constitutional dilemmas. In these cases, we are left with no guidance as to what to do. Legal reasoning, I suggest, is not capable of producing a single right answer in these cases; more importantly, these cases cannot be resolved rationally.”).

a perfectly rational discourse. Even if, *arguendo*, there is no one correct solution to such questions, there are always alternatives that a rational deliberation could eliminate. Rationality is not an all-or-nothing affair, and reasoned deliberations are fundamentally different – indeed fundamentally superior – to simply relying on unreflective preferences or ideological prejudices in resolving such disputes.

Two things remain clear: courts should strive for awareness of possible or actual conflicts among constitutional rights when they resolve constitutional disputes; and they should exercise caution whenever they identify such conflicts – especially when their solution might deprive states of their ability to extend civil liberties. But this cautionary counsel is a weak one: it is by no means a call for some doctrine of judicial abstention or minimalism. Sometimes decisiveness and an expansive reading of one right to the great detriment of another would be perfectly justified. In the end, such resolutions must be worked out in the context of actual conflicts, by looking hard at the factual circumstances and trying to imagine all the possible ramifications of a given decision: as the saying goes, God is in the details – but then again, so is the devil.